

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

2006 JUL 12 A 9:33

Tony Fountain #152157

Plaintiff,

U.S. DISTRICT COURT
MIDDLE DISTRICT AL

Case No. 2:06 -CV-548-MHT

VS.

DR. PESENTI, et al.,
Defendants.

IN OPPOSITION TO THE MAGISTRATE
RECOMMENDATION OF JUNE 28, 2006
AND THE COURT ORDER OF JULY 3RD 2006

Comes now, Tony Fountain, by and through himself hereby "objects" to the Magistrate Recommendation of June 28, 2006, and the Court Order of July 3rd 2006. Plaintiff asserts the following facts in support of this motion of opposition to wit:

Court Jurisdiction

1) Plaintiff contends the Court was without jurisdiction to recommend his claims to be denied. And that his motion to proceed in forma pauperis was never ruled on and has yet to be denied or granted (Waiving Filing fees) as of this date. Ex parte St. John 805 S.2d. 684 (Ala. 2001), Taylor v. Gibson 529 F.2d. 700 at 711 n.1 (1976).

In other words the Granting and Waiving of the initial Filing Fee's Confer's Jurisdiction upon the Court to act, Ex parte st. John SWRS, and any action taken prior to such ruling is void.

Plaintiff, stress the facts that his motion to proceed in forma pauperis status was being held in abeyance because it was not accompanied by an inmate account statement according to 28 U.S.C. 1915(b)(1). The magistrate order of June 22nd 2006, ordered the plaintiff to submit an inmate account statement on or before July 11th 2006 or his action/case would be dismissed.

Plaintiff, contends that he attempting to comply with the Court order of June 22nd 2006, by requesting a p.m.o.d. account print-out from the prisons business office, and after receiving the print-out on the 6-27-06.

He notice that his Avg. Daily Balance was not correct therefore Plaintiff requested an itemization of his P.M.O.D account (see, Exhibit -A). However, Ms. Baxley the business manager responded to my second request for an itemization on 7-3-06 the first she stated "they did not do itemization without a reason for it and asked the plaintiff his reason for one" the second time she responded was on 7-3-06 stating that "Daily Average Balance does not equal an actual balance" (see Ex-

-hibit-A), plaintiff points out the facts that he has yet to submit an inmate account statement as of this date, because he was never given a full opportunity to submit his inmate account statement in according the Court ORDER OF JUNE 22nd 2006. When he in facts was trying to find-out why the print-out stated one thing and he knew another. While trying (waiting) to get some type of Confirmations as to his P.M.O.D account on June 28th 2006 plaintiff prepared a motion for good cause and try attempt to withdraw his motion to proceed in forma pauperis. And maded out a Request slip requesting the business office to withdraw \$250 dollars from his P.M.O.D account and send it to the Clerk. (see attached Exhibit-B) In which he was in the process of submitting to the business office along with a addressed STAMPED ENVELOPE.

On June 29th 2006, he received a recommendation from the Magistrate Judge recommending his petition for an EMERGENCY injunction be denied, prior to him Submitting his Motion For Good Cause and Request (Exhibit-B). Plaintiff at that time felt it would be useless to pay \$250 dollars when the Judge had made up her mind to deny his petition.

Therefore, plaintiff contends that he was never even given the opportunity to comply with the court order of June 22nd 2006, before the recommendation was submitted on June 28 2006. On July 6th 2006 the plaintiff received another court order threatening him with sanctions for inadvertently omitting ".32" cent from his hardship affidavit.

2). Plaintiff stress the point that he did not intentionally/deliberately try to mislead this court, on the day he signed his affidavit of hardship he had a sum of 24.71.32 in his P.M.O.D. account on June 15 2006. And that in his haste to comply with the prisons officials order "that all inmates report back to their assigned living area for count #1 (lockdown)", that he inadvertently omitted the cent sum of ".32" from his ~~old~~ affidavit of hardship. (See Exhibit - C). A canteen receipt that was given him on June 14 2006 the day before his signing his hardship affidavit on June 15 2006 which omitted ".32" cent from the amount of \$24.71. Plaintiff contends that he did not deliberately omitted the cent sum from his affidavit on purpose to mislead this court; but was in his haste to comply with the notary public order to hurry-up we got to court.

Plaintiff further contends, that the magistrate Judge stated in her order of July 5th 2006 that "plaintiff Complied with this ORDER (see Doc. #3) by Filing the requisite inmate account statement on JUNE 27, 2006 (see Doc. #5)" Plaintiff vehemently denies ever filing his inmate account statement on June 27, 2006. Someone else other than him most have submitted his P.M.O.D statement. And that he don't have no idea what Doc. #5 contains in which the magistrate relied upon to issue her order of July 5th 2006. In which the magistrate stated "A Review of Plaintiff P.M.O.D. Statement reflects that as of June 23, 2006 he had an average daily balance ~~for the past year~~, including an average of \$ 2,483.03, and that he had even more of \$ 12,590.93 in June 2005". In which Plaintiff vehemently denies ever having an average daily balance of \$ 12,590.93 and contends he never had that type of money in his account on June 2005 or at any other time. Plaintiff, stress the point that Exhibit-A, will substantiate his contention in which Ms. Barley the business manager stated that "Daily Average Balance does not equal an actual Balance" (see Exhibit-A).

Therefore, whoever the source that gave the Magistrate Judge the erroneous information that in 2005 my daily average balance was \$12,590.93 gave misleading information and they too should be threatened with sanctions and their Identity Revealed. (18 U.S.C. 1623) Moreover, Plaintiff Maintains that his Motion to Proceed in forma pauperis was never Granted and waiving the initial Filing Fee's, nor denied prior to the Magistrate Recommendation of June 28th 2006 or her order of July 5th 2006 which would have Confirmed the Courts Jurisdiction to act accordingly. Ex parte St. John 805 So.2d. 684 (Ala. 2001).

In opposition To Magistrate
Recommendation of June 28, 2006

3). Plaintiff Contends the Court Erred in Recommending that his petition for an Emergency Injunction be denied because it didn't meet the four (4) prerequisites in GRANTING a Preliminary Injunction.

Plaintiff did meet the first
prerequisite of granting a
Preliminary injunction such
as - - -

Plaintiff hereby "objects" to the magistrate recommending that the plaintiff petition be denied for failure to meet the four (4) prerequisite of a preliminary injunction. Plaintiff contends had his PRO SE Complaint been readed in a liberal fashion it would have alerted the juridical minds of the denial of medical care in diagnosing and treating his symptoms. Hines v. Kerner, 1972, 404 U.S. 519, 92 S.Ct. 894, 30 L.Ed.2d. 656. First plaintiff points to the first prerequisite (1) a substantial likelihood that the movant will ultimately prevail on the merits. Plaintiff stress the point that his initial complaint was accompanied by an affidavit in support of his allegations/claims of experiencing symptoms that is commonly associated with prostate cancer and colon cancers a deadly life threatening disease more prevalent in men's 40-65. And that early detection can lead to treatment and cure, when he first notice spots of blood in my stool doing February 20 2006. These symptoms have gotten worst since then and have gone from spots to seeing cloths of individual blood after defecating. And the prison health care provider in house Doctor present confirmed that plaintiff

was in fact experiencing bleeding after a prostate examination on March 21, 2006. And on June 6, 2006, Dr. Peagant informed the plaintiff that his symptoms had gotten worse. And that his June 6, 2006 report would speed things up and would add his orally request for me to be taken out for a Colonoscopy Exam. Dr. Peagant further stated there nothing else I can do without the test results of a Colonoscopy test. The Supreme Court in the case of Estelle v. Gamble had noted that an inmate must rely on the prison authority to treat his medical needs, if the authority fails to provide for those needs then they will not be met. A function like free individual has health needs; however at least two features distinguish the provision of health care to inmate functions. First of All Functions can not provide for his own medical care due to his confinement to the state prison. Estelle, supra. Plaintiff stresses the facts that the symptoms he has been complaining about for the last 4 months or so has taken both a mental and physical toll on him.

unable to get sleep awaking all through the nights after nights due to the mental stress and bad dreams (nightmares), and most the time unable to use the toilet without experiencing pain and fear of bleeding after defecating. The defendants has not taken any steps toward seeing to it that Fountain be taken out to a specialist capable of diagnosing and treating the symptoms plaintiff have been Complaining about, And the failure to do so violates Plaintiff Rights of 8th & 14 Amendment to the United States. Anceta v. Prison Health Service, Inc 769 F.2d. 700, 704 (11th Cir. 1985).

The same thing applies to his Eye Care Complaint which the defendants has out-right refused to provide Fountain with access to the prison Eye doctor. Newnien v. State of Ala. 349 F.Supp.278, 287 (M.D. Ala. 1975) aff'd in part 503 F.2d. 1320 (5th Cir. 1975). Had the magistrate judge readed my initial complaint in liberal fashion, she wouldn't be blaming plaintiff from inadvertently omitting the cents sum of ".32" from his affidavit of hardship, part of was do to him not being able to see that well without glasses. Estelle. supra. United v. Jefferson County 720 F.2d. 150.

Second factor of prerequisite, (2) a substantial threat that plaintiff will suffer irreparable injury. Plaintiff contends the magistrate judge didn't read his initial complaint in a liberal fashion. Hause v. Kerner has she, the plaintiff complaints about not being able to read law books, because the defendants were denying him access to the prison Eye doctor. Newman v. State of Ala., supra And that he have been unable to do the necessary legal in pursue of pending legal action, was a direct violation of his First Amendment Right to petitioned the government for Redress. And if he's not provide Eye-wear he can lose his Eyesight or even damage it more. Firrod v. Burns 427 U.S 347

Third factor of the prerequisite (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party. Plaintiff, contend the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, was spelled out in his original complaint OF State of Fla v. Callaway. 489 F.2d. 567.

4 factor of the prerequisite (4) the public interest will not be harmed if the injunction should issue. Plaintiff also contends that when the public know it Criminal Justice System imprisons a man for a crime, that it is in their interest that he provided with the same medical that any human would want for himself and a family's members that might subjective-
ive it prison system shorter. Cate v. Oldham
707 F.2d. 1176 (1983), because the state prison and society integrity is a stake when prison are made to go without the basic health care afforded to freed individual. Estelle Supr.

Done on this 8th day of July 2006



CERTIFICATE OF SERVICES

I, hereby certify that I have served a true and correct copy of the foregoing upon the Office of the Attorney General 11th South Union St. Montg. Al. 36130, by placing the same in U.S. mail on this 8th day of July 2006.

Sincerely,

